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CPLR 3101(d): Court May Demand Production of Records To Determine If They Are Subject to Disclosure

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CPLR 3101(a): Defendant may be compelled to give examples of his handwriting at an EBT.

CPLR 3101(a) provides for the "full disclosure of all evidence material and necessary"⁷⁹ for conducting one's cause of action. The purpose of this section is to aid in ameliorating court congestion by expediting trials, and, in some cases, encouraging out-of-court settlement of litigation.⁸⁰

In the recent case of *Rosenblatt v. Danzis*,⁸¹ the supreme court, New York County, was confronted with the issue of whether the defendant could be compelled to give examples of his handwriting at an examination before trial. The question arose in an action brought to recover monies paid to the defendant for gambling losses. The plaintiff contended that the payments were made by checks drawn to the order of fictitious payees, which were then endorsed by the defendant. At the examination before trial the defendant refused to sign his name on the grounds that it might tend to incriminate him. In deciding the issue the court held that an example of defendant's handwriting was not only material and necessary but was "an essential, basic and vital element of proof of the plaintiff's cause of action. . . ." ⁸²

The court reasoned that if the sample could not be obtained at the examination before trial, it would require great time and effort to establish the defendant's signature at the trial. Moreover, the production of the handwriting sample might lead to a settlement of the case before trial, if the sample conclusively showed that the handwriting on the checks was or was not the defendant's.

CPLR 3101(d): Court may demand production of records to determine if they are subject to disclosure.

CPLR 3101(d) provides that material prepared for litigation shall not be obtained by way of disclosure,⁸³ unless the court finds

⁷⁹ As to what is material and necessary CPLR 3101(a) should be interpreted to allow discovery of evidence which is sufficiently related to the issues involved to make the effort to obtain it reasonable. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE §3101.07 (1967).

⁸⁰ See generally *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 178, 217 (1964).

⁸¹ 55 Misc. 2d 528, 285 N.Y.S.2d 654 (Sup. Ct. N.Y. County 1967).

⁸² *Id.* at 528, 285 N.Y.S.2d at 655. The court also dismissed the defendant's self-incrimination objection as being without merit. For a case involving a similar fifth amendment objection, see *Mesticelli v. Mesticelli*, 44 Misc. 2d 707, 708, 255 N.Y.S.2d 185, 187 (Sup. Ct. Nassau County 1964), where the court held that the taking of blood in an attempt to show non-paternity and, thus, adultery by the wife, was not within the purview of the privilege against self-incrimination.

⁸³ Subdivision(d) is one of the exceptions to the general disclosure provision, CPLR 3101(a), which provides for the disclosure of "all evidence material and necessary" in the prosecution or defense of a cause of action.

that withholding it would cause undue hardship. However, material prepared in the regular course of business is not exempt from disclosure under 3101(d), even though the reports are also designed to provide information in some possible litigation.⁸⁴

In *Haire v. L.I.R.R.*⁸⁵ the plaintiff in a wrongful death action sought the production of certain records and reports pertaining to the physical condition of one of the defendants. The defendant claimed that the materials sought were subject to exemption under CPLR 3101(d). However, the appellate division, second department, ruled that the records be produced so that the court could determine whether they were made in preparation for litigation or in the regular course of business.⁸⁶

The decision of the court directing the defendant to produce the material in order to determine whether or not such material was protected by CPLR 3101(d) is logical. Without being able to examine the material, the court would be operating under a severe handicap when determining whether or not the material was protected. However, care should be taken to keep the materials in question out of the hands of the party seeking disclosure, until it has been determined that the material is subject to disclosure.

CPLR 3106: Special circumstances not necessary to obtain pre-trial examination before joinder of issue.

Prior to the enactment of the CPLR, a party could only seek an examination before trial after joinder of issue.⁸⁷ However, CPLR 3106 places no such restriction on the taking of pre-trial depositions,⁸⁸ and has been construed as permitting an examination before trial to take place before the serving of an answer.⁸⁹

In 1965, the appellate division, second department, in *In re Estate of Welsh*,⁹⁰ held that pre-trial examinations were allowed

⁸⁴ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3101.50 (1967).

⁸⁵ 29 App. Div. 2d 553, 285 N.Y.S.2d 717 (2d Dep't 1967).

⁸⁶ If the records or reports are prepared in the regular course of business, they are not subject to the exemption of CPLR 3101(d). See, e.g., *Bloom v. New York City Transit Authority*, 20 App. Div. 2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964) in which the court held that certain accident reports were not made in preparation for trial and were thus proper items for discovery.

⁸⁷ RCP 121-a provided for an examination before trial after joinder of issue.

⁸⁸ CPLR 3106 allows an examination before trial "[a]fter an action is commenced. . . ." See *Revesz v. Geiger*, 40 Misc. 2d 818, 243 N.Y.S.2d 744 (Sup. Ct. N.Y. County 1963).

⁸⁹ See, e.g., *Nathanson & Co. v. Macfadden-Bartell Corp.*, 46 Misc. 2d 126, 259 N.Y.S.2d 54 (Sup. Ct. N.Y. County 1965).

⁹⁰ 24 App. Div. 2d 986, 265 N.Y.S.2d 198 (2d Dep't 1965) (mem.).